



## **NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES**

### **National Endowment for the Humanities**

#### **45 CFR Part 1174**

#### **RIN 3136-AA36**

### **Implementation of the Program Fraud Civil Remedies Act of 1986**

**AGENCY:** National Endowment for the Humanities; National Foundation on the Arts and the Humanities.

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** The National Endowment for the Humanities (NEH) is proposing to issue regulations to implement the Program Fraud Civil Remedies Act of 1986 (PFCRA). The PFCRA authorizes certain Federal agencies, including NEH, to impose civil penalties and assessments through administrative adjudication against any person who makes, submits, or presents a false, fictitious, or fraudulent claim or written statement to NEH. The proposed rule will establish the procedures that NEH will follow in implementing the PFCRA, as well as specify the hearing and appeal rights of persons subject to penalties and assessments under the PFCRA.

**DATES:** Send comments on or before [INSERT 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** You may send comments by email to [gencounsel@neh.gov](mailto:gencounsel@neh.gov).

*Instructions:* Include “3136-AA36” in the subject line of the email.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Voyatzis, Deputy General Counsel, Office of the General Counsel, National Endowment for the Humanities, 400 7th Street, SW, Room 4060, Washington, DC 20506; (202) 606-8322; [gencounsel@neh.gov](mailto:gencounsel@neh.gov).

## **SUPPLEMENTARY INFORMATION:**

### **1. Background**

In October 1986, Congress enacted the PFCRA, 31 U.S.C. 3801-3812. The PFCRA established an administrative remedy against any person who makes, or causes to be made, a false claim or written statement to certain Federal agencies. The PFCRA requires these Federal agencies to follow certain procedures in recovering penalties and assessments against people who file false claims or statements for which the liability is \$150,000 or less. Initially, the PFCRA did not apply to NEH. Section 10 of the Inspector General Reform Act of 2008, Pub. L. 110-409, 122 Stat. 4314, however, expanded the PFCRA's scope to include NEH.

The PFCRA requires each covered agency to promulgate rules and regulations necessary to implement its provisions. Following the PFCRA's enactment, the President's Council on Integrity and Efficiency requested that the Department of Health and Human Services lead an inter-agency task force to develop model PFCRA regulations. This action was in keeping with the Senate Governmental Affairs Committee's desire that "the regulations would be substantially similar throughout the government" (S. Rep. No. 99-212, 99th Cong., 1st Sess. 12 (1985)). The Council recommended that all covered agencies adopt the model rule.

Accordingly, NEH is implementing the PFCRA's provisions through this proposed rule—which substantively conforms to the model rule—in order to establish procedures by which NEH will seek to recover penalties and assessments against persons who file, or cause to have filed, false claims or statements with NEH for which liability is \$150,000 or less.

### **2. Maximum Penalty Amount**

The PFCRA established a maximum penalty of \$5,000 for each violation. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act), 28 U.S.C.

2461 note, required all Federal agencies to (1) adjust the penalty amount to 2016 inflation levels with an initial “catch-up” inflation adjustment; and (2) make subsequent annual adjustments for inflation.<sup>1</sup> This proposed rule incorporates the initial “catch-up” adjustment to 2016 inflation levels and the annual adjustments for 2017 through 2021, and applies those adjustments cumulatively to the civil monetary penalties that the PFCRA imposes.<sup>2</sup>

#### **A. Initial “Catch-Up” and 2021 Adjustments for Inflation.**

NEH determined the first “catch-up” adjustment to 2016 inflation levels using the formula set forth in the 2015 Act. Specifically, NEH calculated the percent change between the Consumer Price Index for all Urban Consumers (CPI-U) for October of the last year in which Congress adjusted the PFCRA civil penalties (October 1986) and the CPI-U for October 2015, and then rounded to the nearest dollar.

NEH similarly determined each subsequent annual adjustment by calculating the percent increase between the CPI-U for the month of October preceding the date of the adjustment and the CPI-U for the October one year prior to the October immediately preceding the date of the adjustment.

Table 1, below, details the above calculations.

Table 1—Annual Adjustments to PFCRA Civil Monetary Penalties, 2016–2021

<b>Effective Date</b>	<b>Baseline Maximum Penalty</b>	<b>Applicable Multiplier Based on Percent Increase in CPI-U</b>	<b>New Baseline Maximum Penalty</b>
August 1, 2016	\$5,000	2.15628 <sup>3</sup>	\$10,781
January 15, 2017	\$10,781	1.01636 <sup>4</sup>	\$10,957

<sup>1</sup> For a more detailed explanation of the 2015 Act and the civil monetary penalty inflation adjustment calculations that it requires, see NEH’s regulation implementing the 2015 Act at 85 FR 35566.

<sup>2</sup> Table 1 details the annual adjustments to the PFCRA maximum penalty amount for years 2016–2021.

<sup>3</sup> Office of Management and Budget, Memorandum M-16-06 (February 24, 2016).

<sup>4</sup> Office of Management and Budget, Memorandum M-17-11 (December 16, 2016).

January 15, 2018	\$10,957	1.02041 <sup>5</sup>	\$11,181
January 15, 2019	\$11,181	1.02522 <sup>6</sup>	\$11,463
January 15, 2020	\$11,463	1.01764 <sup>7</sup>	\$11,665
January 15, 2021	\$11,665	1.01182 <sup>8</sup>	\$11,803

## **B. Future Annual Adjustments**

The 2015 Act requires agencies to make annual adjustments to civil penalty amounts no later than January 15 of each year following the initial adjustment. NEH will calculate future annual adjustments using the same method as the adjustments previously described herein. If the CPI-U does not increase, then the civil penalties remain the same.

NEH will publish a Notice in the *Federal Register* containing the amount of these annual inflation adjustments no later than January 15 of each year.

## **Request for Comments**

NEH requests comments, which NEH must receive at the above address, by the above date.

## **Executive Order 12866, Regulatory Planning and Review, and Executive Order 13563, Improving Regulation and Regulatory Review**

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget for review.

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<sup>5</sup> Office of Management and Budget, Memorandum M-18-03 (December 15, 2017).

<sup>6</sup> Office of Management and Budget, Memorandum M-19-04 (December 14, 2018).

<sup>7</sup> Office of Management and Budget, Memorandum M-20-05 (December 16, 2019).

<sup>8</sup> Office of Management and Budget, Memorandum M-21-10 (December 23, 2020).

### **Executive Order 13132, Federalism**

This rulemaking does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

### **Executive Order 12988, Civil Justice Reform**

This rulemaking meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988. Specifically, this rulemaking is written in clear language designed to help reduce litigation.

### **Executive Order 13175, Indian Tribal Governments**

Under the criteria in Executive Order 13175, NEH evaluated this rulemaking and determined that it will not have any potential effects on Federally recognized Indian Tribes.

### **Executive Order 12630, Takings**

Under the criteria in Executive Order 12630, this rulemaking does not have significant takings implications. Therefore, a takings implication assessment is not required.

### **Regulatory Flexibility Act of 1980**

This rulemaking will not have a significant adverse impact on a substantial number of small entities, including small businesses, small governmental jurisdictions, or certain small not-for-profit organizations.

### **Paperwork Reduction Act of 1995**

This rulemaking does not impose an information collection burden under the Paperwork Reduction Act. This action contains no provisions constituting a collection of information pursuant to the Paperwork Reduction Act.

### **Unfunded Mandates Reform Act of 1995**

This rulemaking does not contain a Federal mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year.

## **National Environmental Policy Act of 1969**

This rulemaking will not have a significant effect on the human environment.

## **Small Business Regulatory Enforcement Fairness Act of 1996**

This rulemaking will not be a major rule as defined in section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rulemaking will not result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

## **E-Government Act of 2002**

All information about NEH required to be published in the *Federal Register* may be accessed at [www.neh.gov](http://www.neh.gov). The website [www.regulations.gov](http://www.regulations.gov) contains electronic dockets for NEH's rulemakings under the Administrative Procedure Act of 1946.

## **Plain Writing Act of 2010**

To ensure this proposed rule speaks in plain and clear language so that the public can use and understand it, NEH modeled the language of the proposed rule on the Federal Plain Language Guidelines.

## **List of Subjects in 45 CFR 1174**

Claims, Fraud, Penalties.

For the reasons set forth in the preamble, the National Endowment for the Humanities proposes to amend 45 CFR chapter XI by adding part 1174, to read as follows:

### **PART 1174—PROGRAM FRAUD CIVIL REMEDIES ACT REGULATIONS**

#### **Subpart A—Purpose, Definitions, and Basis for Liability**

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1174.18 Parties' rights to review documents.

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1174.22 Exchange of witness lists, statements, and exhibits.

1174.23 Subpoenas for attendance at the hearing.

1174.24 Protective orders.

1174.25 Filing and serving documents with the ALJ.

1174.26 Computation of time.

1174.27 The hearing and the burden of proof.

1174.28 Presentation of evidence.

1174.29 Witness testimony.

1174.30 Ex parte communications.

1174.31 Sanctions for misconduct.

1174.32 Post-hearing briefs.

### **Subpart E—Decisions and Appeals**

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1174.33 Initial decision.

1174.34 Determining the amount of penalties and assessments.

1174.35 Reconsideration of the initial decision.

1174.36 Finalizing the initial decision.

1174.37 Procedures for appealing the ALJ's decision.

1174.38 Appeal to the authority head.

1174.39 Judicial review.

1174.40 Collection of civil penalties and assessments.

1174.41 Rights to administrative offset.

- 1174.42      Deposit in Treasury of the United States.  
1174.43      Voluntary settlement of the administrative complaint.  
1174.44      Limitations regarding criminal misconduct.

Authority: 31 U.S.C. 3801–3812; 5 U.S.C. App. 8G(a)(2).

## **Subpart A—Purpose, Definitions, and Basis for Liability**

### **§ 1174.1      Purpose.**

This part implements the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801–3812 (PFCRA). The PFCRA provides the National Endowment for the Humanities (NEH), and other Federal agencies, with an administrative remedy to impose civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted or presented, false, fictitious, or fraudulent claims or written statements to NEH. The PFCRA also provides due process protections to all persons who are subject to administrative proceedings under this part.

### **§ 1174.2      Definitions.**

For the purposes of this part—

*ALJ* means an Administrative Law Judge in the authority appointed pursuant to 5 U.S.C. 3105 or detailed to the authority pursuant to 5 U.S.C. 3344.

*Authority* means the National Endowment for the Humanities (NEH).

*Authority head* means the NEH Chairperson or the Chairperson’s designee.

*Benefit* means anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status or loan guarantee.

*Claim* means any request, demand or submission that a person makes—

(a) to the authority—

(1) for property, services, or money (including money representing grants, loans, insurance, or benefits); or

(2) which has the effect of decreasing an obligation to pay or account for property, services, or money; or



(b) to a recipient of property, services, or money from the authority or to a party to a contract with the authority—

(1) for property or services if the United States—

(i) provided such property or services;

(ii) provided any portion of the funds for the purchase of such property or services; or

(iii) will reimburse such recipient or party for the purchase of such property or services;

or

(2) for the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(i) provided any portion of the money requested or demanded; or

(ii) will reimburse such recipient or party for any portion of the money paid on such request or demand.

*Complaint* means the administrative complaint that the reviewing official serves on the defendant under § 1174.8.

*Defendant* means any person alleged in a complaint to be liable for a civil penalty or assessment pursuant to the PFCRA.

*Government* means the United States Government.

*Individual* means a natural person.

*Initial decision* means the written decision of the ALJ under § 1174.33, and includes a revised initial decision issued following a remand or a motion for reconsideration.

*Knows or has reason to know* means that a person, with respect to a claim or statement—

(a) has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(b) acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(c) acts in reckless disregard of the truth or falsity of the claim or statement;

and no proof of specific intent to defraud is required.

*Makes* shall include the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, making or made shall likewise include the corresponding forms of such terms.

*Person* means any individual, partnership, corporation, association, or private organization, and includes the plural of that term.

*Representative* means an attorney who is in good standing of the bar of any State, Territory, or possession of the United States, or the District of Columbia, or the Commonwealth of Puerto Rico, or any other individual who the defendant designates in writing.

*Reviewing official* means the NEH General Counsel or the General Counsel's designee.

*Statement* means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry that a person makes—

(a) with respect to a claim (or eligibility to make a claim) or to obtain the approval or payment of a claim; or

(b) with respect to (or with respect to eligibility for)—

(1) a contract with, or a bid or proposal for a contract with, or

(2) a grant, loan, or benefit from,

the authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit.

### **§ 1174.3 Basis for civil penalties and assessments.**

(a) Claims.

(1) Any person shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than \$11,803 for each claim that person makes that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

- (ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;
- (iii) Includes or is supported by any written statement that—
  - (A) Omits a material fact;
  - (B) Is false, fictitious, or fraudulent as a result of such omission; and
  - (C) Is a statement in which the person making such statement has a duty to include such material fact; or
- (iv) Is for payment for the provision of property or services which the person has not provided as claimed.

- (2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.
- (3) A claim shall be considered made to the authority, recipient, or party when such a claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision of a State, acting for or on behalf of the authority.
- (4) Each claim for property, services, or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid.
- (5) If the Government has made any payment on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section may also be subject to an assessment of not more than twice the amount of that claim or the portion thereof that violates paragraph (a)(1) of this section. Such assessment shall be in lieu of damages that the Government sustained because of such a claim.

(b) Statements.

- (1) Any person shall be subject, in addition to any other remedy prescribed by law, to a civil penalty of not more than \$11,803 for each written statement that person makes that the person knows or has reason to know—

- (i) Asserts a material fact which is false, fictitious or fraudulent; or
- (ii) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such a statement; and
- (iii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the statement's contents.

- (2) A person will only be subject to a civil penalty under paragraph (b)(1) of this section if the written statement made by the person contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the statement's contents.
  - (3) Each written representation, certification, or affirmation constitutes a separate statement.
  - (4) A statement shall be considered made to the authority when it is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision of a State, acting for or on behalf of the authority.
- (c) Proof of specific intent to defraud is not required to establish liability under this section.
  - (d) In any case in which more than one person is liable for making a false, fictitious, or fraudulent claim or statement under this section, each person may be held liable for a civil penalty and assessment.
  - (e) In any case in which more than one person is liable for making a claim under this section on which the Government has made payment, the authority may impose an assessment against any such person or jointly and severally against any combination of persons.
  - (f) The authority will annually adjust for inflation the maximum amount of the civil penalties described in this section, and will publish a document in the *Federal Register* containing the new maximum amount no later than January 15 of each year.

## **Subpart B—Procedures Leading to Issuance of a Complaint**

#### **§ 1174.4      Who investigates program fraud.**

The Inspector General, or his or her designee, is the investigating official responsible for investigating allegations that a person has made a false claim or statement. In this regard, the Inspector General has authority under the PFCRA and the Inspector General Act of 1978, 5 U.S.C. App. 3, as amended, to issue administrative subpoenas for the production of records and documents.

#### **§ 1174.5      Review of suspected program fraud by the reviewing official.**

- (a) If the investigating official concludes that the results of his or her investigation warrant an action under this part, the investigating official shall submit to the reviewing official a report containing the investigation's findings and conclusions.
- (b) If the reviewing official determines that the report provides adequate evidence that a person made a false, fictitious or fraudulent claim or statement, the reviewing official shall transmit to the Attorney General written notice of the reviewing official's intention to refer the matter for adjudication, with a request for approval of such referral. This notice will include the reviewing official's statement concerning:
  - (1) The reasons for the referral;
  - (2) The claims or statements that form the basis for liability;
  - (3) The evidence that supports liability;
  - (4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in the false claim or statement;
  - (5) Any exculpatory or mitigating circumstances that may relate to the claims or statements that are known by the reviewing official or the investigating official;  
and
  - (6) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

- (c) If, at any time, the Attorney General (or designee) requests in writing that the authority stay this administrative process, the authority head must stay the process immediately. The authority head may resume the process only upon receipt of the Attorney General's written authorization.

**§ 1174.6 Prerequisites for issuing a complaint.**

The authority may issue a complaint only if:

- (a) The Attorney General (or designee) approves the reviewing official's referral of the allegations for adjudication; and
- (b) In a case of submission of false claims, if the amount of money or the value of property or services that a false claim (or a group of related claims submitted at the same time) demanded or requested does not exceed \$150,000.

**§ 1174.7 Contents of a complaint.**

- (a) The complaint will state that the authority seeks to impose civil penalties, assessments, or both, against the defendant and will include:
  - (1) The allegations of liability against the defendant and the statutory basis for liability, identification of the claims or statements involved, and the reasons liability allegedly arises from such claims or statements;
  - (2) The maximum amount of penalties and assessments for which the defendant may be held liable;
  - (3) A statement that the defendant may request a hearing by filing an answer and may be represented by a representative;
  - (4) Instructions for filing such an answer; and
  - (5) A warning that failure to file an answer within thirty days of service of the complaint will result in an imposition of the maximum amount of penalties and assessments.

- (b) The reviewing official must serve the complaint on the defendant and, if the defendant requests a hearing, provide a copy to the ALJ assigned to the case.

**§ 1174.8 Service of a complaint.**

- (a) The reviewing official must serve the complaint on an individual defendant directly, on a partnership through a general partner, and on a corporation or an unincorporated association through an executive officer or a director, except that the reviewing official may also make service on any person authorized by appointment or by law to receive process for the defendant.
- (b) The reviewing official may serve the complaint either by:
- (1) Registered or certified mail; or
  - (2) Personal delivery by anyone eighteen years of age or older.
- (c) The date of service is the date of personal delivery or, in the case of service by registered or certified mail, the date of postmark.
- (d) When the reviewing official serves the complaint, he or she should also serve the defendant with a copy of this part and 31 U.S.C. 3801–3812.

**Subpart C—Procedures Following Service of a Complaint**

**§ 1174.9 Answer to a complaint.**

- (a) A defendant may file an answer with the reviewing official within thirty days of service of the complaint. An answer will be considered a request for an oral hearing.
- (b) In the answer, the defendant—
- (1) Must admit or deny each allegation of liability contained in the complaint (a failure to deny an allegation is considered an admission);
  - (2) Must state any defense on which the defendant intends to rely;
  - (3) May state any reasons why the penalties, assessments, or both should be less than the statutory maximum; and

- (4) Must state the name, address, and telephone number of the person the defendant authorized to act as the defendant's representative, if any.
- (c) If the defendant is unable to file a timely answer which meets the requirements set forth in paragraph (b) of this section, the defendant may file with the reviewing official a general answer denying liability, requesting a hearing, and requesting an extension of time in which to file a complete answer. The defendant must file a general answer within thirty days of service of the complaint.
- (d) If the defendant initially files a general answer requesting an extension of time, the reviewing official must promptly file with the ALJ the complaint, the general answer, and the request for an extension of time.
- (e) For good cause shown, the ALJ may grant the defendant up to thirty additional days within which to file an answer that meets the requirements of paragraph (b) of this section. The defendant must file such an answer with the ALJ and must serve a copy on the reviewing official.

**§ 1174.10      Default upon failure to file an answer.**

- (a) If the defendant does not file any answer within thirty days after service of the complaint, the reviewing official may refer the complaint to the ALJ.
- (b) Once the reviewing official refers the complaint, the ALJ will promptly serve on the defendant a notice that the ALJ will issue an initial decision.
- (c) The ALJ will assume the facts alleged in the complaint to be true and, if such facts establish liability under the statute, the ALJ will issue an initial decision imposing the maximum amount of penalties and assessments allowed under the PFCRA.
- (d) Except as otherwise provided in this section, when a defendant fails to file a timely answer, the defendant waives any right to further review of the penalties and assessments the ALJ may impose in the initial decision.
- (e) The initial decision becomes final thirty days after the ALJ issues it.



- (f) At any time before an initial decision becomes final, a defendant may file a motion with the ALJ asking that the ALJ reopen the case. An ALJ may only reopen a case if he or she determines that the defendant set forth in the motion extraordinary circumstances that prevented the defendant from filing a timely answer. The initial decision will be stayed until the ALJ decides on the motion. The reviewing official may respond to the motion.
- (g) If the ALJ determines that a defendant has demonstrated extraordinary circumstances that excuse his or her failure to file a timely answer, the ALJ will withdraw the initial decision and grant the defendant an opportunity to answer the complaint.
- (h) The ALJ's decision to deny a defendant's motion to reopen a case is not subject to reconsideration under § 1174.35.
- (i) The defendant may appeal the ALJ's decision denying a motion to reopen by filing a notice of appeal with the authority head within fifteen days after the ALJ denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the authority head decides the issue.
- (j) If the defendant files a timely notice of appeal with the authority head, the ALJ shall forward the record of the proceeding to the authority head.
- (k) The authority head shall decide expeditiously, based solely on the record before the ALJ, whether extraordinary circumstances excuse the defendant's failure to file a timely answer.
- (l) If the authority head decides that extraordinary circumstances excuse the defendant's failure to file a timely answer, the authority head shall remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.
- (m) If the authority head decides that the circumstances do not excuse the defendant's failure to file a timely answer, the authority head shall reinstate the ALJ's initial decision, which shall become final and binding upon the parties thirty days after the authority head issues such a decision.

**§1174.11 Referral of complaint and answer to the ALJ.**

When the reviewing official receives an answer, he or she must simultaneously file the complaint, the answer, and a designation of the authority's representative with the ALJ.

**Subpart D—Hearing Procedures**

**§ 1174.12 Notice of hearing.**

- (a) When the ALJ receives the complaint and the answer, the ALJ will promptly serve a notice of hearing upon the defendant and the authority's representative in the same manner as the complaint. The ALJ must serve the notice of oral hearing within six years of the date on which the claim or statement was made.
- (b) The hearing is a formal proceeding conducted by the ALJ during which a defendant will have the opportunity to cross-examine witnesses, present testimony, and dispute liability.
- (c) The notice of hearing must include:
  - (1) The tentative date, time, and place of the hearing;
  - (2) The legal authority and jurisdiction under which the hearing is being held;
  - (3) The matters of fact and law to be asserted;
  - (4) A description of the procedures for the conduct of the hearing;
  - (5) The name, address, and telephone number of the defendant's representative and the representative for the authority; and
  - (6) Such other matters as the ALJ deems appropriate.

**§ 1174.13 Location of the hearing.**

- (a) The ALJ shall hold the hearing:
  - (1) In any judicial district of the United States in which the defendant resides or transacts business;
  - (2) In any judicial district of the United States in which a claim or statement in issue was made; or
  - (3) In such other place as the parties and the ALJ may agree upon.

- (b) Each party shall have the opportunity to present arguments with respect to the location of the hearing.
- (c) The ALJ shall decide the time and the place of the hearing.

**§ 1174.14 Parties to the hearing and their rights.**

- (a) The parties to the hearing shall be the defendant and the authority.
- (b) Except where the authority head designates another representative, the NEH General Counsel (or designee) shall represent the authority.
- (c) Each party has the right to:
  - (1) Be represented by a representative;
  - (2) Request a pre-hearing conference and participate in any conference held by the ALJ;
  - (3) Conduct discovery;
  - (4) Agree to stipulations of fact or law which will be made a part of the record;
  - (5) Present evidence relevant to the issues at the hearing;
  - (6) Present and cross-examine witnesses;
  - (7) Present arguments at the hearing as permitted by the ALJ; and
  - (8) Submit written briefs and proposed findings of fact and conclusions of law after the hearing, as permitted by the ALJ.

**§ 1174.15 Separation of functions.**

- (a) The investigating official, the reviewing official, and any employee or agent of the authority who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case:
  - (1) Participate in the hearing as the ALJ;
  - (2) Participate or advise in the authority head's review of the initial decision; or
  - (3) Make the collection of penalties and assessment.

- (b) The ALJ must not be responsible to or subject to the supervision or direction of the investigating official or the reviewing official.

**§ 1174.16      The ALJ's role and authority.**

- (a) An ALJ serves as the presiding officer at all hearings. The Office of Personnel Management selects the ALJ.
- (b) The ALJ must conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.
- (c) The ALJ has the authority to—
  - (1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;
  - (2) Continue or recess the hearing, in whole or in part, for a reasonable period of time;
  - (3) Hold conferences to identify or simplify the issues or to consider other matters that may aid in the expeditious disposition of the proceeding;
  - (4) Administer oaths and affirmations;
  - (5) Issue subpoenas requiring witness attendance and the production of documents at depositions or at hearings;
  - (6) Rule on motions and other procedural matters;
  - (7) Regulate the scope and timing of discovery;
  - (8) Regulate the course of the hearing and the conduct of representatives and parties;
  - (9) Examine witnesses;
  - (10) Receive, rule on, exclude, or limit evidence;
  - (11) Upon motion of a party, take official notice of facts;
  - (12) Upon motion of a party, decide cases, in whole or in part, by summary judgment when there is no disputed issue of material fact;

- (13) Conduct any conference, argument or hearing on motions in person or by telephone; and
- (14) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(d) The ALJ does not have the authority to find Federal statutes or regulations invalid.

**§ 1174.17      Disqualification of reviewing official or ALJ.**

- (a) A reviewing official or an ALJ may disqualify himself or herself at any time.
- (b) Upon any party's motion, the reviewing official or ALJ may be disqualified as follows:
  - (1) The party must support the motion by an affidavit containing specific facts establishing that personal bias or other reason for disqualification exists, including the time and circumstances of the party's discovery of such facts;
  - (2) The party must file the motion promptly after discovery of the grounds for disqualification or the objection will be deemed waived; and
  - (3) The party, or representative of record, must certify in writing that such party makes the motion in good faith.
- (c) Once a party has filed a motion to disqualify, the ALJ will halt the proceedings until he or she resolves the disqualification matter. If the ALJ disqualifies the reviewing official, the ALJ will dismiss the complaint without prejudice. If the ALJ disqualifies himself or herself, the authority will promptly reassign the case to another ALJ.

**§ 1174.18      Parties' rights to review documents.**

- (a) Once the ALJ issues a hearing notice pursuant to § 1174.12, and upon written request to the reviewing official, the defendant may:
  - (1) Review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the investigating official based his or her findings and conclusions, unless such

documents are subject to a privilege under Federal law, and obtain copies of such documents upon payment of duplication fees; and

- (2) Obtain a copy of all exculpatory information in the reviewing official's or investigating official's possession that relates to the allegations in the complaint, even if it appears in a document that would otherwise be privileged. If the document would otherwise be privileged, the other party only must disclose the portion containing exculpatory information.
- (b) The notice that the reviewing official sends to the Attorney General, as described in § 1174.5(b), is not discoverable under any circumstances.
- (c) If the reviewing official does not respond to the defendant's request within twenty days, the defendant may file with the ALJ a motion to compel disclosure of the documents, subject to the provisions of this section. The defendant may only file such a motion with the ALJ after filing an answer pursuant to § 1174.9.

**§ 1174.19      Discovery.**

- (a) Parties may conduct the following types of discovery:
- (1) Requests for production of documents for inspection and copying;
  - (2) Requests for admissions of authenticity of any relevant document or of the truth of any relevant fact;
  - (3) Written interrogatories; and
  - (4) Depositions.
- (b) For the purpose of this section, the term "documents" includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.
- (c) Unless the parties mutually agree to discovery, a party may conduct discovery only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.
- (d) Each party shall bear its own discovery costs.

**§ 1174.20      Discovery Motions.**

- (a) Any party seeking discovery may file a motion with the ALJ together with a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.
- (b) Within ten days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in § 1174.24.
- (c) The ALJ may grant a motion for discovery only if he or she finds that the discovery sought—
  - (1) Is necessary for the expeditious, fair, and reasonable consideration of the issues;
  - (2) Is not unduly costly or burdensome;
  - (3) Will not unduly delay the proceeding; and
  - (4) Does not seek privileged information.
- (d) The burden of showing that the ALJ should allow discovery is on the party seeking discovery.
- (e) The ALJ may grant discovery subject to a protective order under § 1174.24.

**§ 1174.21      Depositions.**

- (a) If the ALJ grants a motion for deposition, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will take place.
- (b) The party seeking to depose shall serve the subpoena in the manner prescribed by § 1174.8.
- (c) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.
- (d) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it shall make available to all other parties for inspection and copying.

**§ 1174.22      Exchange of witness lists, statements, and exhibits.**

- (a) As ordered by the ALJ, the parties must exchange witness lists and copies of proposed hearing exhibits, including copies of any written statements or transcripts of deposition testimony that each party intends to offer in lieu of live testimony.
- (b) If a party objects, the ALJ will not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to an opposing party in advance, unless the ALJ finds good cause for the omission or concludes that there is no prejudice to the objecting party.
- (c) Unless a party objects within the time set by the ALJ, documents exchanged in accordance with this section are deemed to be authentic for the purpose of admissibility at the hearing.

**§ 1174.23 Subpoenas for attendance at the hearing.**

- (a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.
- (b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.
- (c) A party seeking a subpoena shall file a written request no less than fifteen days before the hearing date unless otherwise allowed by the ALJ for good cause shown. Such request shall specify any documents to be produced, designate the witness, and describe the witness' address and location with sufficient particularity to permit the witness to be found.
- (d) The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.
- (e) The party seeking the subpoena shall serve it in the same manner prescribed in § 1174.8. The party seeking the subpoena may serve the subpoena on a party, or upon an individual under the control of a party, by first class mail.



- (f) The party requesting a subpoena shall pay the subpoenaed witness' fees and mileage in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage shall accompany the subpoena when it is served, except that when the authority issues a subpoena, a check for witness fees and mileage need not accompany the subpoena.
- (g) A party, or the individual to whom the subpoena is directed, may file with the ALJ a motion to quash the subpoena within ten days after service, or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

**§ 1174.24 Protective orders.**

- (a) A party, prospective witness, or deponent may file a motion for a protective order that seeks to limit the availability or disclosure of evidence with respect to discovery sought by an opposing party or with respect to the hearing.
- (b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
- (1) That the parties shall not have discovery;
  - (2) That the parties shall have discovery only on specified terms and conditions;
  - (3) That the parties shall have discovery only through a method of discovery other than requested;
  - (4) That the parties shall not inquire into certain matters, or that the parties shall limit the scope of discovery to certain matters;
  - (5) That the parties shall conduct discovery with no one present except persons designated by the ALJ;
  - (6) That the parties shall seal the contents of the discovery;
  - (7) That a sealed deposition shall be opened only by order of the ALJ;

- (8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation shall not be disclosed or shall be disclosed only in a designated way; or
- (9) That the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as the ALJ directs.

**§ 1174.25 Filing and serving documents with the ALJ.**

- (a) Documents filed with the ALJ must include an original and two copies. Every document filed in the proceeding must contain a title (e.g., motion to quash subpoena), a caption setting forth the title of the action, and the case number assigned by the ALJ. Every document must be signed by the person on whose behalf the paper was filed, or by his or her representative.
- (b) Documents are considered filed when they are mailed. The mailing date may be established by a certificate from the party or its representative, or by proof that the document was sent by certified or registered mail.
- (c) A party filing a document with the ALJ must, at the time of filing, serve a copy of such document on every other party. When a party is represented by a representative, the party's representative must be served in lieu of the party.
- (d) A certificate from the individual serving the document constitutes proof of service. The certificate must set forth the manner in which the document was served.
- (e) Service upon any party of any document other than the complaint must be made by delivering a copy or by placing a copy in the United States mail, postage prepaid and addressed to the party's last known address.
- (f) If a party consents in writing, documents may be sent electronically. In this instance, service is complete upon transmission unless the serving party receives electronic notification that transmission of the communication was not completed.

**§ 1174.26      Computation of time.**

- (a) In computing any period of time under this part or in an order issued under it, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday that is observed by the Federal government, in which event it includes the next business day.
- (b) When the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays that are observed by the Federal government are excluded from the computation.
- (c) Where a document has been served or issued by placing it in the mail, an additional five days will be added to the time permitted for any response.

**§ 1174.27      The hearing and the burden of proof.**

- (a) The ALJ conducts a hearing in order to determine whether a defendant is liable for a civil penalty, assessment, or both and, if so, the appropriate amount of the penalty and/or assessment.
- (b) The hearing will be recorded and transcribed. The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding, constitute the record for the ALJ's and the authority head's decisions.
- (c) The hearing will be open to the public unless otherwise ordered by the ALJ for good cause shown.
- (d) The authority must prove a defendant's liability and any aggravating factors by a preponderance of the evidence.
- (e) A defendant must prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

**§ 1174.28      Presentation of evidence.**

- (a) The ALJ shall determine the admissibility of evidence.

- (b) Except as provided in this part, the ALJ shall not be bound by the Federal Rules of Evidence, but the ALJ may apply the Federal Rules of Evidence where he or she deems appropriate.
- (c) The ALJ shall exclude irrelevant and immaterial evidence.
- (d) The ALJ may exclude evidence, although relevant, if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.
- (e) The ALJ shall exclude evidence, although relevant, if it is privileged under Federal law.
- (f) Evidence concerning compromise or settlement offers shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.
- (g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.
- (h) All documents and other evidence taken for the record must be open to examination by all parties unless the ALJ orders otherwise.

**§ 1174.29      Witness testimony.**

- (a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.
- (b) At the ALJ's discretion, the ALJ may admit testimony in the form of a written statement or deposition. The party offering such a statement must provide it to all other parties along with the last known address of the witness, in a manner which allows sufficient time for other parties to subpoena the witness for cross-examination at the hearing. The parties shall exchange deposition transcripts and prior written statements of witnesses proposed to testify at the hearing as provided in § 1174.22.
- (c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence.
- (d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) Upon any party's motion, the ALJ shall order witnesses excluded from the hearing room so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

- (1) A party who is an individual;
- (2) In the case of a party that is not an individual, the party's officer or employee appearing for the entity pro se or designated by the party's representative; or
- (3) An individual whose presence a party shows to be essential to the presentation of its case, including an individual employed by the Government or engaged in assisting the Government's representative.

**§ 1174.30 *Ex parte* communications.**

A party may not communicate with the ALJ *ex parte* unless the other party consents to such a communication taking place. This does not prohibit a party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

**§ 1174.31 Sanctions for misconduct.**

- (a) The ALJ may sanction a person, including any party or representative, for failing to comply with an order, or for engaging in other misconduct that interferes with the speedy, orderly, and fair conduct of a hearing.
- (b) Any such sanction shall reasonably relate to the severity and nature of the misconduct.
- (c) When a party fails to comply with an order, including an order for taking a deposition, producing evidence within the party's control, or responding to a request for admission, the ALJ may:
  - (1) Draw an inference in favor of the requesting party with regard to the information sought;
  - (2) In the case of requests for admission, deem each matter for which an admission is requested to be admitted;

- (3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon testimony relating to, the information sought; and
  - (4) Strike any part of the pleadings or other submissions filed by the party failing to comply with such a request.
- (d) The ALJ may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.
- (e) If a party fails to prosecute or defend an action under this part that is commenced by service of a hearing notice, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

**§ 1174.32 Post-hearing briefs.**

Any party may file a post-hearing brief. Such briefs are not required, however, unless ordered by the ALJ. The ALJ must fix the time for filing such briefs, not to exceed sixty days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

**Subpart E—Decisions and Appeals**

**§ 1174.33 Initial decision.**

- (a) The ALJ will issue an initial decision based only on the record. It will contain findings of fact, conclusions of law, and the amount of any penalties and assessments.
- (b) The ALJ will serve the initial decision on all parties within ninety days after the hearing's close or, if the ALJ permitted the filing of post-hearing briefs, within ninety days after the final post-hearing brief was filed.
- (c) The findings of fact must include a finding on each of the following issues:
  - (1) Whether any one or more of the claims or statements identified in the complaint violate this part; and

(2) If the defendant is liable for penalties or assessments, the appropriate amount of any such penalties or assessments, considering any mitigating or aggravating factors.

(d) If the defendant is liable for a civil penalty or assessment, the initial decision shall describe the defendant's right to file a motion for reconsideration with the ALJ or a notice of appeal with the authority head.

**§ 1174.34 Determining the amount of penalties and assessments.**

In determining an appropriate amount of civil penalties and assessments, the ALJ and the authority head, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose.

**§ 1174.35 Reconsideration of the initial decision.**

- (a) Any party may file a motion with the ALJ for reconsideration of the initial decision within twenty days of receipt of the initial decision. If the initial decision was served by mail, there is a rebuttable presumption that the party received the initial decision five days from the date of mailing.
- (b) A motion for reconsideration must be accompanied by a supporting brief and must describe specifically each allegedly erroneous decision.
- (c) A party only may file a response to a motion for reconsideration upon the ALJ's request.
- (d) The ALJ will dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.
- (e) If the ALJ issues a revised initial decision upon a party's motion, no party may file a further motion for reconsideration.

**§ 1174.36 Finalizing the initial decision.**

- (a) Thirty days after issuance, the ALJ's initial decision shall become the authority's final decision and shall bind all parties, unless any party timely files a motion for

reconsideration or any defendant adjudged to have submitted a false, fictitious, or fraudulent claim or statement timely appeals to the authority head, as set forth in § 1174.37.

- (b) If the ALJ disposes of a motion for reconsideration by denying it or by issuing a revised initial decision, the ALJ's order on the motion for reconsideration shall become the authority's final decision thirty days after the ALJ issues the order, unless a defendant that is adjudged to have submitted a false, fictitious, or fraudulent claim or statement timely appeals to the authority head, as set forth in § 1174.37.

**§ 1174.37      Procedures for appealing the ALJ's decision.**

- (a) Any defendant who submits a timely answer and is found liable in an initial decision for a civil penalty or assessment may appeal the decision.
- (b) The defendant may file a notice of appeal with the authority head within thirty days following issuance of the initial decision, serving a copy of the notice of appeal on all parties and the ALJ. The authority head may extend this deadline for up to an additional thirty days if the defendant files an extension request within the initial thirty day period and shows good cause.
- (c) The authority head shall not consider a defendant's appeal until all timely motions for reconsideration have been resolved.
- (d) If the ALJ denies a timely motion for reconsideration, the defendant may file a notice of appeal within thirty days following such denial or issuance of a revised initial decision, whichever applies.
- (e) The defendant must support its notice of appeal with a written brief specifying why the authority head should reverse or modify the initial decision.
- (f) The authority's representative may file a brief in opposition to the notice of appeal within thirty days of receiving the defendant's appeal and supporting brief.



- (g) If a defendant timely files a notice of appeal, and the time for filing reconsideration motions has expired, the ALJ will forward the record of the proceeding to the authority head.
- (h) An initial decision is automatically stayed pending disposition of a motion for reconsideration or of an appeal to the authority head.
- (i) No administrative stay is available following the authority head's final decision.

**§ 1174.38      Appeal to the authority head.**

- (a) A defendant has no right to appear personally, or through a representative, before the authority head.
- (b) There is no right to appeal any interlocutory ruling.
- (c) The authority head will not consider any objection or evidence that was not raised before the ALJ unless the defendant demonstrates that extraordinary circumstances excuse the failure to object. If the defendant demonstrates to the authority head's satisfaction that extraordinary circumstances prevented the presentation of evidence at the hearing, and that the additional evidence is material, the authority head may remand the matter to the ALJ for consideration of the additional evidence.
- (d) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment that the ALJ imposed in the initial decision or reconsideration decision.
- (e) The authority head will promptly serve each party to the appeal and the ALJ with a copy of the decision. This decision must contain a statement describing the right of any person, against whom a penalty or assessment has been made, to seek judicial review.

**§ 1174.39      Judicial review.**

31 U.S.C. 3805 authorizes the appropriate United States District Court to review any final decision imposing penalties or assessments, and specifies the procedures for such review. To

obtain judicial review, a defendant must file a petition with the appropriate court in a timely manner.

**§ 1174.40      Collection of civil penalties and assessments.**

31 U.S.C. 3806 and 3808(b) authorize actions for collecting civil penalties and assessments imposed under this part and specify the procedures for such actions.

**§ 1174.41      Rights to administrative offset.**

The authority may make an administrative offset under 31 U.S.C. 3716 to collect the amount of any penalty or assessment which has become final, for which a judgment has been entered, or which the parties agree upon in a compromise or settlement. However, the authority may not make an administrative offset under this subsection against a Federal tax refund that the United States owes to the defendant then or at a later time.

**§ 1174.42      Deposit in Treasury of the United States.**

The authority shall deposit all amounts collected pursuant to this part as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

**§ 1174.43      Voluntary settlement of the administrative complaint.**

- (a) Parties may make offers of compromise or settlement at any time. Any compromise or settlement must be in writing.
- (b) The reviewing official has the exclusive authority to compromise or settle the case from the date on which the reviewing official is permitted to issue a complaint until the ALJ issues an initial decision.
- (c) The authority head has exclusive authority to compromise or settle the case from the date of the ALJ's initial decision until initiation of any judicial review or any action to collect the penalties and assessments.
- (d) The Attorney General has exclusive authority to compromise or settle the case while any judicial review or any action to recover penalties and assessments is pending.

- (e) The investigating official may recommend settlement terms to the reviewing official, the authority head, or the Attorney General, as appropriate.

**§ 1174.44      Limitations regarding criminal misconduct.**

- (a) Any investigating official may:

- (1) Refer allegations of criminal misconduct or a violation of the False Claims Act directly to the Department of Justice for prosecution and/or civil action, as appropriate;
- (2) Defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution; or
- (3) Issue subpoenas under any other statutory authority.

- (b) Nothing in this part limits the requirement that the authority's employees must report suspected violations of criminal law to the NEH Office of the Inspector General or to the Attorney General.

Dated: June 16, 2021

Elizabeth Voyatzis,

Deputy General Counsel, National Endowment for the Humanities.

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